Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 15, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS* [2]

Amicus Home Care Association of New York State, Inc. ("HCA" or "Home Care Association") is a not-for-profit organization that promotes and supports high-quality, cost-

[1] *Amicus* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and both parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

effective home care and community services for the citizens of New York State. The Association has approximately 250 members, most of which are non-profit and governmental home care provider agencies, and some of which are for-profit providers. HCA's members serve the majority of New York's Medicare and Medicaid beneficiaries receiving home care services, including 250,000 persons in New York City alone. HCA participated as an *amicus* when this case was formerly before the Court, and also as an *amicus* in the court of appeals on the remand.

The Second Circuit's decision if left in place would impose a devastating burden on the ability of HCA's provider members to provide high quality, affordable companionship services to elderly and infirm patients throughout New York State by invalidating a long-standing regulation of the United States Department of Labor ("DOL" or "agency") that exempts home care companionship services from federal wage and overtime laws under the Fair Labor Standards Act ("FLSA"). The rule at issue implements a statutory exemption that Congress enacted for the express purpose of making these domestic companionship services more widely available to those who need them, thus allowing them to avoid less desirable alternatives such as nursing home placement.

Hundreds of providers, including HCA's members, have relied for over thirty years on the rule invalidated by the Second Circuit to develop companionship services that have kept hundreds of thousands of people in their homes and communities. The importance of the exemption in achieving these goals was recognized by the agency after extensive rulemaking proceedings when it adopted the regulation in 1975 and when it determined to retain the rule in 2002, and again when it issued an extensive Advisory Memorandum last year reaffirming the rule and confirming that it represented the agency's considered exercise of its delegated rulemaking authority.

The Home Care Association accordingly urges this Court to grant the Petition for Certiorari so that it can review the Second Circuit's rulings and eliminate the serious harms that invalidation of the rule creates for providers in New York State, and the uncertainties it creates for providers in other jurisdictions.

SUMMARY OF ARGUMENT

The Second Circuit's rulings misapply this Court's precedent and ignore the sound policy reasons invoked by Congress and the agency in enacting and continuing the longstanding exemption for home companionship services. Rejecting the views of every other court to have considered the matter, including the Tenth Circuit, the Second Circuit invalidated the regulation even though it (a) was the subject of two full rounds of notice and comment rulemaking, (b) has been in place for thirty years with the acquiescence of Congress, and (c) is fully consistent with the language of the governing statute. Remarkably, the Second Circuit reached its conclusion even though it concluded that the result reached by the agency was not contrary to the language of the statute or any other authoritative expression of Congress' intent and purpose. Indeed, it conceded on remand from this Court that "[c]onsideration of Congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)." Pet. App. at 5a.

The Second Circuit's decision thus conflicts with numerous decisions of this Court, including *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*"), which requires full deference to an agency decision issued after formal consideration through procedures such as notice and comment rulemaking; *Alaska Department of Environmental Conservation v. EPA*, 124 S. Ct. 983 (2004), which grants "particular deference" to agency interpretations of "longstanding duration;" and *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc. ("Chevron")*, 467 U.S. 837 (1984), which re-

quires courts to defer to reasonable agency constructions of statutes they are charged to administer unless Congress has foreclosed the agency's construction by speaking directly to the contrary. The Second Circuit's assertion that deference was not appropriate because the agency chose to label the regulation as an "interpretation" is likewise inconsistent with a host of sound precedents that reject mechanical invocations of form over substance. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000)(finding it "well-established" that the key question is not the agency's "labeling" of the rule, but whether the "interpretation" carries the "force and effect of law.")

The Second Circuit decisions thus create the very result that sound principles of administrative review are intended to avoid. They upset a reasonable and longstanding agency rule, around which important and necessary health care arrangements have been made for decades, without any consideration of the harmful effects of that holding.

As set out in submissions by numerous affected parties to the Second Circuit and to this Court when the case was last before it, the exemption of domestic companionship services under the FLSA is critical to the quality of care. The budgets of HCA's provider members are severely constrained and dependent on government reimbursements, predominantly Medicaid, that are themselves decreasing due to state budget constraints and under-reimbursements. *See* Pet. App. at 104a-105a. Unable to fund the significantly increased overtime payments the Second Circuit's rulings mandate, providers will be forced to staff home companion cases on shorter shifts, thus requiring more caregivers per case. *Id.* at 106a. This will reduce the continuity of care to recipients of home companionship services, increase the time needed to train multiple caregivers on the same case, and reduce wages and other compensation to home care workers who will no longer be offered the opportunity to work overtime hours. Providers

will also be forced to seek additional workers at a time when staffing shortages already exist, and when new regulatory requirements are further limiting the availability of workers. *Id.*

The Second Circuit's decisions create a circuit split on an issue of great significance to the Home Care Association and others with an interest in the provision of home companion services, and will effect a massive disruption to the delicately balanced system that makes home care – a desired alternative to institutionalization – an affordable and safe option for tens of thousands of home care patients in New York State. They also ignore the plain language of the statute, are contrary to Congress' intent, and violate numerous principles of administrative review that require particular deference to the agency under the circumstances of this case. This Court should therefore grant the Petition for Certiorari so that it may review and reverse the Second Circuit's rulings.

ARGUMENT

I. THE SECOND CIRCUIT'S RULINGS CONTRAVENE ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE BY REJECTING AN AGENCY STATUTORY CONSTRUCTION THAT THE COURT ADMITTED WAS NOT INCONSISTENT WITH EITHER THE TEXT OR THE PURPOSE OF THE STATUTE.

A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History.

The statutory exemption at issue, codified at 29 U.S.C. § 213 (a)(15), applies to

> any employee employed on a casual basis in domestic service employment to provide babysitting services or

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary) . . .

This statutory language applies by its terms to any employee providing companionship services in domestic service employment. It does not exclude employees employed by third parties. No statutory language makes *any* reference to third party employers. The Second Circuit's rulings are thus unsupported by the plain language of the statute. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms," quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1 (2000)).

The descriptions of the exemption in the legislative history are likewise broad and make no reference to any such limitation of the statutory exemption.[3] Indeed, the relevant legislative history expressly recognizes the need to allow elderly and infirm individuals to remain in their own homes rather than being displaced to nursing homes. As noted in floor debate on the bill, compliance with federal wage and overtime requirements would "increase tremendously the cost

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[3] *See* H.R. Rep. No. 93-913, (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2821 (noting that "the provision does not apply to a person who, on an intermittent basis, provides baby sitting services, or who provides companion services."); *id.* at 2845 ("the exemption reflects the intent of the committee to exclude from coverage babysitters for whom domestic service is a casual form of employment and companions for individuals who are unable because of age and infirmity to care for themselves."); H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865 ("The conference substitute retains the exemption for casual babysitters and companions contained in both bills and retains the overtime exemption for "live in" domestic employees.")

of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (1972)(comments of Sen. Taft). The Second Circuit nonetheless overturned DOL's longstanding rule exempting all employees providing home companionship services, thus substantially disrupting the provision of such services in New York (and other states governed by the ruling), and adversely affecting the very health care workers the decision purportedly seeks to protect by reducing their opportunities for overtime and hence their overall compensation.[4]

In its first decision the Second Circuit purported to find that the rule was inconsistent with the "context of the entire statutory and regulatory scheme," Pet. App. at 8a, and asserted that it is "implausible" Congress "would have wanted" the rule. *Id.* at 30a. In its decision on remand from this Court, however, the Second Circuit abandoned reliance on this ground, acknowledging that it could reach no "definitive conclusion" as to Congress' intent. *Id.* at 5a. The appeals court nonetheless improperly refused to defer to the agency's resolution of the matter.

The Second Circuit's refusal to defer to an agency construction not contrary to the plainly expressed intent of Congress runs squarely contrary to the principles of *Chevron* as applied by this Court. As this Court noted in *Rust v. Sullivan*, 500 U.S. 173, 184 (1991), "[i]f a statute is 'silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' *Chevron*, 467 U.S. at 842-843." This Court went on to hold:

> The Secretary's construction . . . may not be disturbed as an abuse of discretion if it reflects a plausible con-

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[4] The Second Circuit by contrast explicitly considered statements from the legislative history in its discussion of 29 C.F.R. § 552.6, and upheld that regulation. *See* Pet. App. at 17a-18a, 21a-22a.

> struction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Ibid. In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*, at 843, n. 11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.*, at 844.

Id.

The Second Circuit's refusal to defer to the agency's construction was particularly inappropriate given that Congress has amended the Act *seven* times since the rule was promulgated in 1975, without disturbing the rule in any way.[5] This Court has repeatedly admonished that longstanding agency interpretations are to be given "particular deference." *See, e.g., Alaska Department of Environmental Conservation v. EPA*, 540 U.S. at 487 (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002), and *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Instead, the court of appeals simply substituted its own view of the exemption for that of the agency.

In sum, far from precluding the DOL rule, both the statutory text and the legislative history support it, as neither suggests any limitation of the exemption based on whether the domestic companions are employed by the patient, the family, or a third party. The Second Circuit's decision to

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[5] "It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Hibbs v. Winn*, 542 U.S. 88 (Stevens, J., concurring).

invalidate the rule squarely contravenes numerous decisions of this Court requiring deference in such circumstances to the judgments made by the agency charged with administering the statute, particularly where, as here, Congress has not disturbed the agency's longstanding interpretation.

B. The Second Circuit's Reasons For Declining To Grant Deference Are Erroneous.

Unable to point to anything in the text of the statute or its legislative history that required invalidating the DOL rule, the Second Circuit devoted much of its attention to a discussion of the appropriate level of deference owed the agency. *See Chevron*, 467 U.S. at 842-43 & n.9 (deference to the agency is required if "Congress has not directly addressed the precise question at issue"). The Second Circuit acknowledged that "[a]ll courts that have considered § 552.109(a) have accorded it *Chevron* deference." Pet. App. at 25a. Nonetheless, the Second Circuit held that *Chevron* deference was not appropriate, and then proceeded to give the agency's rule effectively no deference at all. The Second Circuit's analysis on this point was erroneous and inconsistent with the precedents of this Court and of other courts of appeals.

The Second Circuit's determination that *Chevron* deference was not required was based on its conclusions that the rule was "interpretive," rather than legislative, and that the notice and comment procedure undertaken by the agency "was not required." Pet. App. at 27a. Both of these conclusions were wrong, as was the Second Circuit's illogical leap from them to the further conclusion that the use of notice and comment procedures should not confer *Chevron* deference under *Mead* if the notice and comment is undertaken voluntarily.

The Second Circuit's holding that the rule was "interpretive" was based on the agency's placement of the rule under the heading "Subpart B- Interpretations," and on the agency's supposedly "self-conscious" admission that the rule was not

issued under the delegated authority of 29 U.S.C. § 213(a)(15). Pet. App. at 26a-27a. The Second Circuit conceded, however, that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," *id.* at 26a, and that it "was promulgated following notice and comment procedures." *Id.* at 25a. Moreover, the effect of the rule is to define which employees providing companionship services are subject to the exemption – precisely the task that Congress delegated to the agency by statute.

Other than its reliance on the agency's label, however, the Second Circuit did not explain why the rule defining companionship services should be considered legislative, while the rule exempting such services if provided in the home should be considered non-legislative. Indeed, under the Second Circuit's reasoning, the agency could have achieved full deference merely by relabeling the rule and adding a citation in the Federal Register. This result is both illogical and directly contrary to this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 455-56 (1997), which granted *Chevron* deference to a DOL regulation that, like § 552.109(a), was also contained in a subpart labeled "Interpretations."

The Second Circuit erred in relying on the agency's labeling of its rule, rather than on its substance and the actual circumstances of its issuance. Courts have made clear in a variety of contexts that the substance of an agency's rule governs, not its label. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005), ("fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule,"); *Appalachian Power*, 208 F.3d at 1024 (it is "well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation;" question is whether

the "interpretation" carries the "force and effect of law.") The Second Circuit was thus wrong to conclude that, simply because the rule was labeled "interpretive," the notice and comment procedures provided by the agency were gratuitous and not required by law.

As noted above, the Second Circuit conceded that the rule affected substantive rights and obligations "as legislative regulations do." Pet. App. at 26a. The Second Circuit also effectively conceded that the rule was intended to have the "force and effect of law" when it noted that the rule's enforcement would preclude Respondent's claims for minimum wage and overtime compensation, and consequently declared that the rule "cannot be enforced." Pet. App. at 8a, 32a. If the rule were truly interpretive, and not legislative, there would have been no need to declare it "unenforceable." The Second Circuit cited no authority supporting its conclusion that, under such circumstances, the rule was properly classified as "interpretive" and thus was not subject to notice and comment rulemaking.[6]

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[6] The only case the Second Circuit cited on the point, *American Postal Workers' Union ("APWU") v. USPS*, 707 F.2d 548 (D.C. Cir. 1983), was decided before *Chevron* and did not deal with the question of deference at all. Unlike the present case, the rule at issue in *APWU* was *not* subjected to notice and comment rulemaking, and did not "fill in the gaps" because Congress had set out a detailed formula on the matter at issue rather than expressly leaving the matter to agency rulemaking. *See APWU*, 707 F.2d at 559. Moreover, in *APWU*, the agency conceded it was not acting pursuant to statutory authority and was merely implementing a prior interpretation by the Comptroller General. Here, by contrast, the agency has expressly asserted that the rule was promulgated "pursuant to its express statutory authority . . . to define and delimit the terms of the exemption." *See* Pet. App. at 51a. Moreover, even the case cited by the Second Circuit noted that "an agency's characterization of its own action is not conclusive," *APWU*, 707 F.2d at 559; yet as noted above, the Second Circuit relied on nothing else for its conclusion that the rule was interpretive and did not require notice and comment. The Second Circuit's reliance on the *APWU* case for this point is also inconsistent with

The Second Circuit likewise offered no sound authority for its conclusion that *Mead* deference is inappropriate when notice and comment rulemaking is undertaken voluntarily, citing only a law review article that described the question as "within an area of uncertainty." Pet. App. at 28a & n.6.[7] *Mead* distinguished agency interpretations that result from considered determinations based on formal procedures, and that are intended to have precedential effect, from *ad hoc* determinations using informal procedures. *See, e.g., PRMA,* 362 F.3d at 822 n.5 (distinguishing the 10,000 to 15,000 *ad hoc* decisions per year, from 49 different offices, at issue in *Mead* from a uniform policy adopted through statutory interpretation that was entitled to *Chevron* deference.) *Mead* does not suggest that the agency's use of formal procedures should be discounted merely because they are undertaken voluntarily.

The goal of the APA's notice and comment procedures is to "increase public participation and fairness in agency decisionmaking and to establish a mechanism by which an agency can improve its own information base." *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992). That goal was met in this case when the agency, expressly charged by statute to define and delimit the scope of the domestic companionship exemption, increased public participation and im-

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later federal appellate precedent. *See, e.g., Pharmaceutical Research & Manufacturers of Am. v. Thompson*, ("*PRMA*"), 362 F.3d 817, 822 (D.C. Cir. 2004) ("Through this 'express delegation of specific interpretive authority,' *Mead*, 533 U.S. at 229, the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law. The Secretary's interpretations of the Medicaid Act are therefore entitled to *Chevron* deference.")

[7] Indeed, the court cited, but chose not to follow, another law review article concluding that an agency's use of notice and comment rulemaking procedures should offer it a "safe harbor" entitlement to *Chevron* deference under *Mead*. *Id.*

proved its own information base through notice and comment rulemaking proceedings. The agency received substantial information as to the harms that would result if the exemption were applied to companionship services, and took this into account in its final rule. It reconfirmed its interpretation last year in a Memorandum intended to have binding effect and issued at a high level of the agency by the Deputy Administrator. Pet. App. at 50a-64a. The resulting rule is fully deserving of *Chevron* deference under *Mead*.

Finally, the Second Circuit's suggestion that the agency's notice and comment procedures here were "idiosyncratic" and "insufficient" because the agency changed its mind during rulemaking also ignores the realities of the rulemaking process. *See* Pet. App. at 5a, 27a. Public notice and comment procedures are undertaken so that the agency can take the information it gains into account in a meaningful way. The procedures would be empty exercises if an agency, having given fair notice of the issues it is considering, were to be precluded from changing its view on those issues after comment. The *Chevron* decision itself notes that a change in an agency's views does not deprive the agency's interpretation of deference: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 864. *See Rust v. Sullivan*, 500 U.S. at 186 ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question," *quoting Chevron*, 467 U.S. at 862). *See also Connecticut v. U.S. Department of Interior*, 228 F.3d 82, 93-94 (2d Cir. 2000)(rejecting argument that deference is not due an agency interpretation reversing a prior position.) This principle applies with even more force here, as the agency never adopted the proposed interpretation that would have removed third-party employers from the exemption.

In sum, the Second Circuit's analysis of the deference issue went seriously awry. It misapplied *Chevron* and *Mead*, and ignored the substantial deference the agency's rule is due even if *Chevron* were not applicable, given that it has been in place without change for thirty years, and has been left undisturbed seven times by Congress. *See Alaska Department of Environmental Conservation*, 540 U.S. at 492-93 (affirming agency interpretation of "longstanding duration" because it was a "rational interpretation" of the statute.) The requirement of substantial deference to long-standing agency interpretations would be rendered meaningless if courts could, as occurred here, reject agency interpretations fully consistent with the statutory language by substituting their own views.

Unless corrected by this Court, the Second Circuit's erroneous deference analysis will apply to all agency cases in that circuit, and retain the potential to confuse courts in other circuits as well. The Petition thus raises an important question with respect to judicial review of the administrative construction of statutes generally, as well as presenting a matter of great importance to the many parties that have relied on the specific agency rule that the Second Circuit improperly invalidated.

II. THE SECOND CIRCUIT'S DECISIONS WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE.

The Second Circuit's decisions are as harmful as they are erroneous. The agency issued 29 C.F.R. § 552.109(a) based on an extensive rulemaking record compiled in 1974 and 1975, *see* 40 Fed. Reg. 7404 (February 20, 1975), and reaffirmed it after taking extensive comments on a proposed amendment to the rule in 2001. *See* 67 Fed. Reg. 16,668 (April 8, 2002)(withdrawing proposed amendment). The rulemaking records contained substantial evidence of the

harms that would ensue if the statutory exemption were construed to exclude providers of companionship services employed by third parties, and the agency noted that including such employees in the exemption was fully consistent with the statutory language. *Id.*

The Second Circuit's decisions, by contrast, were made on the basis of virtually no record, and do not discuss or even acknowledge the adverse effects on providers and recipients of companionship services. Instead, the Second Circuit ruled on the basis of the pleadings alone, which as the District Court recognized, "provide little factual background." Pet. App. at 34a. A wide spectrum of governmental, nonprofit, and for-profit providers, including HCA, the City of New York and the New York State Association of Counties, the Home Care Council of New York City, Inc., the National Association for Home Care & Hospice, Inc., the New York State Association of Health Care Providers, Inc., and the Continuing Care Leadership Coalition have participated in this litigation to point out the numerous deleterious consequences of that decision.

The Second Circuit's rulings will decrease the availability of high quality home companionship services. As HCA's President averred to the Second Circuit, "the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State." Declaration of C. Rodat ¶ 3, Pet. App. at 104a.

As noted in HCA's declaration, HCA's provider members already face severely constrained budgets due to their reliance on government reimbursement, predominantly through Medicaid, which is calculated on historical rather than current health care costs, and due to overall decreases in government spending over the last decade. *Id.* ¶¶ 4-6, Pet. App. at 104a-

105a. Providers' inability to fund increased overtime will require them to staff cases on shorter shifts, using a limited pool of workers willing to work those shifts. This will likely lead to gaps in coverage and hurt continuity of care as patients must contend with increased turnover in caregivers. *Id.* ¶¶ 7-8, Pet. App. at 106a. Patients suffering from Alzheimer's Disease and other forms of dementia generally receive full time care, and benefit particularly from close interaction with familiar caregivers. Increased turnover among health care workers also increases the burden on skilled nurses required to supervise each worker serving a client, further taxing the resources of provider agencies.

HCA's President also averred that "[m]any patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services." *Id.* ¶ 8, Pet. App. at 103a. Such a result is directly contrary to Congress' intent in exempting companionship services from the minimum wage and overtime requirements of the Act. In *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (9th Cir. 1990), the Ninth Circuit was similarly "informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA."

Recent developments further increase the pressures created by the Second Circuit's decision. New York State has implemented a new criminal history check and fingerprinting requirements that adds new costs on providers and exacerbates the shortage of home care workers, as the process can take several weeks to complete. *See* 10 N.Y.C.R.R. § 400.23. These additional costs, which were raised substantially on September 1, 2006, are subject to reimbursement, but have so far been borne by providers, including HCA's members, who already face severe cost constraints due to their reliance on government reimbursement through Medicaid and Medicare. Funding levels for these reimbursements are outside HCA's

control, and increases are highly unlikely given federal and state budget deficits.[8] Federal law provided a zero percent inflation increase in Medicare payments for fiscal year 2006, and the Administration's proposed 2007 budget would freeze Medicare payments for another year.[9] Attrition will also increase as fewer home health care workers are given the opportunity to earn overtime. *See* C. Rodat Decl. ¶ 9, Pet. App. at 106a ("Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.")

The Second Circuit's rulings will also harm those recipients of home companion services, and their families, who need those services provided in their homes, but who are unable or unwilling to act as the direct employer of the service provider. *See* Letter from Sen. Christopher S. Bond to Mr. Thomas M. Markey, dated July 26, 2001 ("Many elderly do not care to be in this role, preferring the simplicity an reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the simplicity and reliability of service provided by them."). Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications and suitability, arranging to pay their wages and benefits, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when the companion is sick or otherwise unavailable. Yet, under the Second Circuit's ruling, if those persons use a third party

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[8] HCA has lobbied the State for increased funding to pay increased salaries for home care workers. See S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5.

[9] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5201, 120 Stat. 4, 46-47 (2006), amending 42 U.S.C. § 1395fff(b)(3)(B)(ii)(IV).

to handle these tasks they are now subject to dramatically increased costs through the application of federal wage and overtime laws. The agency has determined in the course of two extended rulemakings concerning 29 C.F.R. 552.109(a) that neither the statute nor sound policy requires such a result.

In sum, the Second Circuit's ruling will create a massive and wholly unnecessary disruption to the system through which New York has provided important home care services for decades. In reliance on the agency's long-standing exemption of home companionship services from the Act, whether or not those services are provided by third party employers, and on Congress' long-standing refusal to upset this rule, New York has developed an effective network through which social service agencies administer and supervise government-funded personal care programs, and under which Medicaid home care recipients are, with limited exceptions, receiving service from aides employed by home care providers licensed by the State of New York.[10] Because the DOL's rule is fully consistent with the statute and its legislative history, the appeals court's intervention to upset this system is gratuitous. By reviewing and overturning the Second Circuit's erroneous rulings invalidating the rule, this Court would prevent significant disruptions to this system.

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[10] *See* Michael S. Sparer, Medicaid and the Limits of State Health Reform 110-111 (1996)(describing New York City's efforts to channel government–funded home care services through third-party agencies).

CONCLUSION

Amicus respectfully submits that petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 2006